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No.

IN THE
Supreme Court of the United States

MAXINE ELIZABETH WELLINGTON,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lujan-Armendariz v. INS*, the Ninth Circuit held that an alien whose offense would qualify for rehabilitation under the Federal First Offender Act, 18 U.S.C. § 3607, but who is convicted and has his or her conviction expunged under state law may not be removed on account of a first-time drug offense. *See* 222 F.3d 728, 732 (9th Cir. 2000).

Petitioner Maxine Wellington is an alien who pleaded guilty in a New York court to seventh degree possession of a controlled substance – an offense that would qualify for treatment under the Federal First Offender Act. Mrs. Wellington had her state-court conviction expunged under New York law, but the Second Circuit nevertheless held that Mrs. Wellington was ineligible for cancellation of removal from the United States because Mrs. Wellington had been "convicted" of a controlled-substance violation for purposes of the federal immigration laws.

The question presented by this Petition is:

Whether the Second Circuit erred in holding—in acknowledged conflict with the Ninth Circuit—that an alien who secures relief under state law from disabilities arising from a state-court drug conviction that would have qualified for rehabilitative treatment under the Federal First Offender Act is nevertheless subject to removal and ineligible for cancellation of removal under § 212 of the Immigration and Nationality Act?

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OPINIONS BELOW

The Second Circuit's decision is reported at 623 F.3d 115 and reprinted in the Appendix ("App.") at App. 1–18a. The decision of the Board of Immigration Appeals ("BIA") dismissing Mrs. Wellington's appeal of the Immigration Judge's order of removal is reprinted at App. 19–22a. The oral decision of the Immigration Judge ("IJ"), as corrected, is reprinted at App. 23–32a.

JURISDICTION

The Second Circuit issued its decision on October 20, 2010. App. 1a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reprinted in the Appendix. These provisions include: the Federal First Offender Act ("FFOA"), 18 U.S.C. § 3607; Section 101(a)(48)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(48)(a); Section 212(a)(2)(A)(i)(II) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(II); Section 212(a)(6)(A)(i) of the INA, 8 U.S.C. § 1182(a)(6)(A)(i); and Section 239(b)(1) of the INA, 8 U.S.C. § 1229b(b)(1).

The relevant constitutional provision is the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law ...."

STATEMENT

There is a longstanding and acknowledged conflict among the courts of appeals on the question of whether an alien whose state-law drug conviction has been expunged is nevertheless subject to removal (and ineligible for cancellation from removal) under federal immigration law. As a result of this circuit split, the immigration status of an alien who is a rehabilitated first-time drug offender depends entirely upon whether or not her immigration proceedings take place within the geographic boundaries of the Ninth Circuit, not the substantive merits of her claims. This is an intolerable condition in the context of federal immigration law, where the interests of uniformity are paramount.

The petitioner respectfully submits that the Ninth Circuit's approach is the correct one in this case. Maxine Elizabeth Wellington was a lawful temporary resident of the United States who pleaded guilty as a first-time offender to cocaine possession in the seventh degree under New York law. In the years following her conviction, Mrs. Wellington served out her sentence, remained lawfully employed, raised a family, and, by all accounts, served as a model for rehabilitation. Although Mrs. Wellington could have qualified for rehabilitative treatment under the FFOA, she was prosecuted in state court and could therefore seek expungement of her conviction only under state law.

Under the Second Circuit's decision, this arbitrary and fortuitous circumstance—having been prosecuted in state court instead of federal court—meant that Mrs. Wellington would be deported despite the relatively minor nature of her drug

offense and despite her commendable progress toward rehabilitation. This inequity is inconsistent with the equal protection guarantees embedded in the Due Process Clause of the Fifth Amendment and the requirement that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). It also violates longstanding policy of the BIA and well-settled precedent of the courts requiring uniform treatment of aliens who are first-time drug offenders.

The question presented is recurring and important. It has significant consequences for any alien who may be convicted of a controlled-substance violation, and for any alien who must decide whether to plead guilty to any such offense. It also has broader significance for immigration policy, as the BIA currently applies different rules to identically-situated aliens as a result of the circuit split. This case presents a highly suitable vehicle for resolving that conflict. For these reasons, and as set forth below, the Court should grant this petition.

I. Factual Background

Maxine Elizabeth Wellington is a citizen of Jamaica who entered the United States on January 23, 1981. App. 4a. Mrs. Wellington married Steven Wellington, a United States citizen, on June 21, 1986, and she was granted temporary resident status in the United States on October 29, 1989. App. 4a. On May 23, 1995, Mrs. Wellington pleaded guilty in the City Court of Criminal Pleas in Rochester, New York to seventh-degree possession of cocaine under New York Penal Law § 220.03. App. 4a–5a. The Immigration and Naturalization Service ("INS")

terminated her temporary resident status on May 13, 1996 as a result of her drug conviction. App. 5a.

More than a decade later, on February 15, 2007, Mrs. Wellington was arrested by immigration officials and placed in removal proceedings. App. 5a. The Government charged Mrs. Wellington with removability under 8 U.S.C. § 1182(a)(6)(A)(i) as an alien who was unlawfully present in the United States without being admitted or paroled. App. 5a. The Government also charged Mrs. Wellington with removability under 8 U.S.C. § 1182(a)(2)(A)(i)(II) as an alien who had been convicted of a controlled-substance offense. App. 5a. The basis for the second charge was Mrs. Wellington's 1995 conviction for seventh-degree possession of cocaine. App. 5a.

II. The Immigration Proceedings

In proceedings before the IJ, Mrs. Wellington conceded removability based on her unlawful presence in the United States. App. 6a. Mrs. Wellington disputed the charge of removability based on her 1995 conviction, however, and filed an application for cancellation of removability based on "exceptional and extremely unusual hardship" to her spouse. App. 6a. Mrs. Wellington explained to the IJ that she intended to file a motion in state court to vacate her 1995 conviction, as she believed that vacating or expunging the conviction would eliminate any impediment to securing cancellation of removal under 8 U.S.C. § 1229b(b)(1). App. 6a.

Mrs. Wellington filed a motion in the Rochester City Court to vacate her 1995 conviction on March 31, 2008. App. 6a, 34a. In support of her motion, Mrs. Wellington claimed that she had received ineffective assistance of counsel because she had

received assurances that her plea to seventh-degree possession would not have any adverse repercussions for her immigration status. App. 34a. In the alternative, Mrs. Wellington asked for vacatur in light of the likely immigration consequences of her conviction and the evidence of her rehabilitation in the 13 years since she had been convicted. App. 6a.

On June 27, 2008, the court denied Mrs. Wellington's claim of ineffective assistance, holding that she had not established prejudice. App. 39a. The court noted, however, that the failure of proof was not entirely Mrs. Wellington's fault, stating that "the inaction of the Immigration and Naturalization Service on defendant's deportation case ha[d] contributed to the sparse record presented here." App. 40a. The court explained that "the intervening thirteen years, the advise [*sic*] of counsel and the inaction of INS, all lulled the defendant into a false sense of security and washed her memory of important details." App. 40a–41a.

The court granted Mrs. Wellington's request for a Certificate of Relief from Disabilities. App. 6a. Although no formal opinion accompanied the Certificate, the court observed in rejecting Mrs. Wellington's ineffective assistance claims that, "as an interested on-looker of the deportation proceedings, [it] cannot help but conclude that the interests of justice mandate that the deportation case be decided in the defendant's favor." App. 40a. The court went on to note that:

> in the intervening thirteen year period between the entry of the plea and the filing of this motion, defendant completed her sentence of incarceration, raised a family,

> became gainfully employed, and from all appearances, has led a model life. It is the hope of this court that the disposition of the deportation case take[s] all these factors into consideration.

App. 41a. With the state court having expunged her 1995 conviction, Mrs. Wellington returned to the IJ with the argument that she had become statutorily eligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1) because she had not been "convicted" of a controlled-substance offense. App. 7a.

On December 3, 2008, Mrs. Wellington argued to the IJ that the Certificate of Relief precluded her prior conviction from being used as a basis for removal or a bar to cancellation of removal. App. 7a. In support of her argument, Mrs. Wellington relied upon *Rehman v. INS*, 544 F.2d 71 (2d Cir. 1976), "which held that an alien who received a Certificate of Relief for a state conviction of drug possession was not "convicted" for immigration purposes if full expungement of a federal conviction would have been available...in federal court." App. 7a.

The IJ rejected Mrs. Wellington's argument and held that *Rehman* was not applicable. App. 7a. The IJ held that, in the years since *Rehman* was decided, Congress had established a statutory definition of "conviction" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which was codified at 8 U.S.C. § 1101(a)(48)(A). App. 7a. Under the new definition of "conviction," the BIA had held in *Matter of Roldan-Santoyo*, 22 I & N. Dec. 512 (BIA 1999) ("Roldan"), that no effect was to be given to a state rehabilitative action such as an expungement or Certificate of Relief, unless the state

court action was related to a substantive or procedural defect in the underlying criminal proceeding. App. 7a–8a. Based on the BIA's interpretation of the 1996 definition of "conviction," the IJ determined that Wellington's 1995 controlled-substance conviction subjected her to removal under 8 U.S.C. § 1182(a)(2)(A)(i)(II) and rendered her ineligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1). App. 8a. Accordingly, the IJ ordered Mrs. Wellington deported. App. 32a.

On appeal, the BIA affirmed the IJ's determinations that Mrs. Wellington was subject to removal under 8 U.S.C. § 1182(a)(2)(A)(i)(II) and ineligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1). App. 22a. The BIA agreed with the IJ's analysis of the statutory definition of "convicted" and the legal effect of Mrs. Wellington's Certificate of Relief from Disabilities. App. 4a. The BIA dismissed Mrs. Wellington's appeal. App. 22a.

III. The Decision of the Second Circuit

Mrs. Wellington sought review in the Second Circuit, arguing that the BIA erred in finding her "convicted" of a controlled-substance offense under 8 U.S.C. § 1182(a)(2)(A)(i)(II) and ineligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1). App. 2a–3a. Mrs. Wellington argued that she was not "convicted" for purposes of § 1182(a)(2)(A)(i)(II) because she received a Certificate of Relief from Disabilities from the New York court with jurisdiction over her 1995 conviction. App. 3a–4a. Mrs. Wellington noted that she would have qualified for relief under the FFOA had she been prosecuted in federal court. App. 4a.

The Second Circuit noted that Mrs. Wellington's petition for review presented a question of first impression. App. 13a. The court had held previously that the BIA was reasonable in concluding that an alien remains "convicted" of a removable offense under § 1101(a)(48)(A) even when the conviction is vacated or accorded other rehabilitative treatment under state law. *See Saleh v. Gonzales*, 495 F.3d 17, 21–25 (2d Cir. 2007); *Mugalli v. Ashcroft*, 258 F.3d 52, 61–62 (2d Cir. 2001). But the court had never addressed whether an alien who secured expungement under state law was still "convicted" for immigration purposes if full expungement under the FFOA would have been available for an analogous prosecution in federal court. App. 13a.

The court recognized that Mrs. Wellington's argument found some support in *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995), which held that an alien who secured expungement under a state statute would not be removed on the basis of the underlying offense if she could establish that she would have been eligible for treatment under the FFOA had she been prosecuted in federal court. App. 11a. But the court noted that the IIRIRA's statutory definition of "conviction" post-dated the decision in *Manrique*. App. 11a. Moreover, the BIA had more recently held in *Roldan* that an expungement under state law that was not based upon a defect in the underlying criminal proceeding "was still 'a conviction within the meaning of § 101(a)(48)(A),' irrespective of whether the defendant could avail himself of FFOA relief had he been tried in federal court." App. 11a (quoting *Roldan*, 22 I. & N. Dec. at 528) (alterations omitted).

Although the Second Circuit acknowledged that "[t]he Courts of Appeals are split as to whether the rule in *Matter of Roldan* should be upheld," it rejected Mrs. Wellington's arguments on the basis of *Roldan*. App. 11a. The court reasoned that the definition of "conviction" established in 1996 by the IIRIRA is ambiguous with respect to the treatment of convictions subject to rehabilitative treatment. App. 14a. Having determined that the term "conviction" is silent or ambiguous, the court analyzed whether the BIA's interpretation in *Roldan* was "a permissible construction of the statute." App. 14a (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, Inc., 467 U.S. 837, 843 (1984)). On that point, the court found nothing in the text or legislative history of the IIRIRA that would compel the BIA to enforce an implied exception to the definition of "conviction" for offenses that have been expunged under state-law analogues to the FFOA. App. 15a. The court therefore held that "the BIA's refusal to recognize an implied exception to § 101(a)(48)(A) is 'rational and consistent with the statute.'" App. 15a (quoting *Saleh*, 495 F.3d at 22).

Finally, the Second Circuit held that the BIA could permissibly distinguish between aliens who had secured expungement under state law and aliens who had secured relief under the FFOA. App. 16a. The court rejected as dictum its reasoning in *Rehman* that "[t]here is no sound reason why state policies should not be accorded the same respect as federal leniency policies." App. 16a (quoting 544 F.2d at 74). It held instead that "there arguably is a rational basis for distinguishing between aliens whose criminal cases are dismissed under the FFOA and aliens who receive Certificates of Relief or

similar state rehabilitative relief." App. 16a–17a. Citing the Third Circuit's decision in *Acosta v. Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003), the court posited, *inter alia*, that Congress might have intended to deny immigration relief to state-law offenders out of a concern that unfamiliar state schemes could create a loophole for aliens to escape the consequences of what should properly be considered a conviction under state law. App. 17a.

The Second Circuit denied Mrs. Wellington's petition for review. This petition follows.

REASONS FOR GRANTING THE WRIT

I. This Petition Raises An Important Question Of Immigration Law That Has Divided The Federal Courts Of Appeals.

The Court should grant the petition for certiorari because the Second Circuit's decision deepens a longstanding and unambiguous circuit split. In denying Mrs. Wellington's petition for review, the Second Circuit explicitly acknowledged that "[t]he Courts of Appeals are split as to whether the rule in *Matter of Roldan* should be upheld." App. 11a. The Second Circuit joined those circuits that hold "there is no exception to the definition of 'conviction' under the INA for aliens who receive state rehabilitative relief consistent with that available under the FFOA." App. 11a (citing *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157–58 (10th Cir. 2006); *Resendiz-Alcaraz v. Ashcroft*, 383 F.3d 1262, 1266–71 (11th Cir. 2004); *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 328–31 (5th Cir. 2004); *Acosta*, 341 F.3d at 222–27; *Gill v. Ashcroft*, 335 F.3d 574, 577–79 (7th Cir.

2003)).[1] It expressly rejected the approach of the Ninth Circuit, which it characterized as holding that "an exemption to the definition of 'conviction' *existed* for state rehabilitative relief consistent with that available under the FFOA." App. 12a (citing *Lujan-Armendariz*, 222 F.3d at 749 (emphasis in original)).

The conflict among the courts of appeals is mature and entrenched. The Ninth Circuit has not backed down from its view that *Roldan* is incorrect, nor retreated from its holding that an alien who has secured state-law relief from the consequences of a first-time, simple-possession conviction may not be deported on the basis of that offense.

As recently as 2009, for instance, the Ninth Circuit vacated a BIA decision holding an alien categorically ineligible for cancellation of removal on the basis of an expunged, state-court conviction for possession of drug paraphernalia. *See Ramirez-Altamirano v. Holder*, 563 F.3d 800 (9th Cir. 2009). The court reiterated its reasoning that, because "the FFOA provides immigration relief for first-time defendants found guilty of drug possession in federal court, the Equal Protection Clause requires a parallel exception for similarly situated defendants prosecuted in state court." *Id.* at 806. Citing *Lujan-Armendariz*, the court reaffirmed that "the Equal Protection Clause requires that the immigration benefits of the FFOA be extended to those

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[1] In addition to the cases cited by the Second Circuit, the Eighth Circuit also expressly rejected the Ninth Circuit's holding in *Lujan-Armendariz*. *See Vasquez-Velezmoro v. INS*, 281 F.3d 693, 697 (8th Cir. 2002).

individuals granted relief under state rehabilitative statutes who 'would have been eligible for relief under the [FFOA] had their offenses been prosecuted as federal crimes." *Id.* at 807 (quoting *Lujan-Armendariz*, 222 F.3d at 749).

In fact, the Ninth Circuit has even expanded the holding of *Lujan-Armendariz*. The court extended the reasoning of *Lujan-Armendariz* to first-time drug convictions that were expunged under foreign statutes, so long as the offender would have qualified for relief under the FFOA if he or she had been prosecuted in federal court. *See Dillingham v. INS*, 267 F.3d 996, 1006 (9th Cir. 2001). The Ninth Circuit based its decision on the ground that "equal protection considerations prohibit the government from treating differently aliens who have committed identical offenses and have had their convictions expunged, simply because of the origin of the statute under which they were lawfully rehabilitated." *Id.* at 1006–07. As might be expected, other circuits have rejected the holding of *Dillingham*, just as they had rejected the holding of *Lujan-Armendariz*. *See, e.g.*, *Danso v. Gonazales*, 489 F.3d 709, 716–17 (5th Cir. 2007) (citing *Madriz-Alvarado*, 383 F.3d at 332–34).

The BIA, for its part, is powerless to resolve the circuit split. After the Ninth Circuit rejected the BIA's ruling in *Roldan*, the agency refused to acquiesce to the Ninth Circuit's decision in *Lujan-Armendariz*. *See Matter of Salazar*, 23 I. & N. Dec. 223 (BIA 2002). The BIA is bound by *Lujan-Armendariz* within the Ninth Circuit's jurisdiction, however, and so it held that, "*except in the Ninth Circuit*, a first-time simple drug possession offense expunged under a state rehabilitative statute is a

conviction under section 101(a)(48)(A) of the Act." *Id.* at 235 (emphasis added). Thus, the conflict among the circuits has resulted, and continues to result, in the disparate enforcement of federal immigration law. And the conflict will persist until this Court (or Congress) steps in to resolve it.

II. The Second Circuit Erred In Holding That Mrs. Wellington Was Ineligible For Cancellation Of Removal Even Though Her Conviction Had Been Expunged.

Mrs. Wellington's petition for review rests upon a straightforward and commonsensical proposition: the right of a rehabilitated first-time offender to seek relief under the immigration laws should turn on the substantive merits of her case—not on the fortuity of whether she was prosecuted in state or federal court.

For more than three decades, the BIA recognized that immigrants should not be subjected to deportation for first-time, simple-possession drug offenses. *See, e.g.*, *Matter of Werk*, 16 I. & N. Dec. 234–36 (BIA 1977). "In the interest of uniform and fair application of the immigration laws," the BIA held that relief from deportation "should be extended equally to any alien drug offender who could have obtained the same treatment under federal law if he had been subject to federal rather than state prosecution." *Manrique*, 21 I. & N. Dec. at 63–64. The BIA's departure from these principles in *Roldan* was a mistake, based upon an erroneous interpretation of the INA as amended by the IIRIRA.

The Second Circuit hardly considered the merits of the BIA's position in *Roldan* when it denied review in this case. Other courts have grappled with the text of the FFOA, the statutory definition of

"conviction" introduced in the IIRIRA, and established authorities concerning the effect of state-law expungement in federal immigration proceedings. In this case, by contrast, the Second Circuit did no such thing. Instead, it relied upon the decision in *Saleh v. Gonzales*, which held—in a case that did not involve a first-time offender who would have qualified for treatment under the FFOA—that the term "conviction," as it appears in 8 U.S.C. § 1101(a)(48)(A), is ambiguous for purposes of *Chevron* Step-One. *See Saleh*, 495 F.3d at 22. Because it had determined in *Saleh*—in a different context from Mrs. Wellington's case—that "conviction" is an ambiguous term, the court held that it needed "to consider only whether the BIA has adopted 'a permissible construction of the statute.'" App. 14a (quoting *Chevron*, 467 U.S. at 843).

Because the Second Circuit decided that "conviction" was ambiguous in the abstract, it did not consider the existing statutory provisions that should have guided the interpretation of that term. Specifically, the FFOA—which was not considered in *Saleh*—enables a first-time offender found guilty of simple drug possession to have the charges dismissed without entry of a conviction. *See* 18 U.S.C. § 3607(a). The FFOA makes clear that an offense disposed of under its provisions "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, *or for any other purpose*." *Id.* § 3607(b) (emphasis added). This statute provided the basis for the BIA's cases holding that first-time drug offenders could seek relief from the consequences of their convictions under federal immigration law, without regard for whether the

offenders were convicted in federal or state courts. *See Manrique*, 21 I. & N. Dec. at 64.

In *Roldan*, the BIA refused to give effect to rehabilitative state-law statutes on the ground that the IIRIRA's definition of "conviction" supplanted the BIA's earlier common-law understanding of the term. *See Roldan*, 22 I. & N. Dec. at 520–21. But the BIA erred in concluding that a new statutory definition of "conviction" would deprive the FFOA of any effect on immigration proceedings. After all, Congress was silent on the FFOA and the effect of expungements when it enacted § 1101(a)(48)(A). Absent an express indication that the FFOA would not affect immigration matters, the BIA erred in concluding that the FFOA was repealed by implication.

The Court has repeatedly cautioned that "[i]nferring repeal from legislative silence is hazardous at best." *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003). The touchstone for finding repeal by implication is evidence of Congress' manifest intent—in particular, a "positive repugnancy" between existing law and a newly-enacted statute. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154–55 (1976). No such repugnancy exists between the FFOA and the IIRIRA's definition of "conviction." One establishes a general definition for immigration purposes while the other carves out a narrow exception to that definition. Because the two statutory provisions can easily co-exist, the BIA was wrong to conclude that the IIRIRA had impliedly repealed the FFOA.

Similarly, the Second Circuit failed to consider the constitutional implications of the BIA's decision to treat aliens convicted under state law from

identically-situated aliens who had been convicted under federal law. It is well-settled that Congress's power over immigration matters is limited "by the Constitution itself and considerations of public policy and justice." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889)). Under the Fifth Amendment, aliens are entitled to equal protection of the laws, *Plyler v. Doe*, 457 U.S. 202, 212–13 (1982), including the guarantee "that all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

The interpretation of the IIRIRA that was adopted by the BIA and approved by the Second Circuit does not comport with this constitutional guarantee. Two aliens convicted of the same offense who both qualify for rehabilitative treatment under the FFOA are similarly situated. The two aliens are no less similarly situated because one was prosecuted in state court and the other prosecuted in federal court. Yet the BIA's decision in *Roldan* and the Second Circuit's decision here would require the deportation of one of the aliens while the other would avoid removal from the United States. As the Ninth Circuit held in *Lujan-Armendariz*, this disparate treatment is contrary to principles of equal protection because "there is no rational basis for a federal statute that treats persons adjudged guilty of a drug offense under state law more harshly than persons adjudged guilty of the identical offense under federal law." *See* 222 F.3d at 749.

The BIA's interpretation of the IIRIRA thus violates two basic canons of statutory construction: the canon against implied repeal and the canon of

constitutional avoidance. The Second Circuit should have applied these canons of statutory construction before concluding that the term "conviction" was ambiguous for purposes of *Chevron* Step One. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501–02 (1998). Because the court ignored these principles, it denied Mrs. Wellington's petition on the basis of a flawed interpretation of the applicable federal statutes.

III. This Case Presents A Suitable Vehicle For Resolving A Longstanding Conflict That Has Impeded The Uniform Application Of Federal Immigration Laws.

As detailed above, the conflict between the Ninth Circuit's decision in *Lujan-Armendariz* and the appellate decisions upholding *Roldan* is creating an intolerable disparity in the enforcement of federal immigration law. An alien's entitlement to relief from the immigration consequences of a first-time, conviction for simple possession in state court depends upon whether or not the alien's immigration proceedings commence within the territorial jurisdiction of the Ninth Circuit. Within the Ninth Circuit, an alien will avoid deportation; within the other federal circuits, the alien is categorically barred from seeking cancellation of removal. There is no justification for permitting that stark disparity of treatment to persist, particularly in view of the Constitution's contemplation of a "uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4.

This case presents a suitable vehicle for resolving the conflict. It should be beyond dispute that Mrs. Wellington would have been eligible for cancellation of removal under the Ninth Circuit's decision in

Lujan-Armendariz. There is no alternative basis for denying Mrs. Wellington the relief that she seeks.

Indeed, Mrs. Wellington is precisely the sort of individual who should be permitted to avail herself of the protections of the FFOA and other rehabilitative statutes. She was a temporary lawful resident before she pleaded guilty to a seventh-degree charge of possessing cocaine. App. 5a. She claims to have pleaded guilty only because her counsel assured her that doing so would not affect her immigration status. App. 34a. At least one judge noted that the delay of more than thirteen years between Mrs. Wellington's conviction and deportation may be at least partially responsible for her inability to prove her allegations of ineffective assistance of counsel in connection with that guilty plea. App. 40a–41a.

More importantly, as the judge of the Rochester City Court of Criminal Pleas observed:

> [I]n the intervening thirteen year period between the entry of the plea and the filing of this motion, defendant completed her sentence of incarceration, raised a family, became gainfully employed, and from all appearances, has led a model life.

App. 41a. It is not surprising, in light of these circumstances, that the court would declare that "the interests of justice mandate that the deportation case be decided in the defendant's favor." App. 40a.

Furthermore, there may be no better vehicle for resolving the conflict among the circuits. The BIA is bound by *Lujan-Armendariz* in the Ninth Circuit. As such, the BIA does not apply the *Roldan* decision to cases within the Ninth Circuit. *See Salazar*, 23

I. & N. Dec. at 235 (BIA 2002) ("[E]xcept in the Ninth Circuit, a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction under § 101(a)(48)(A)"). There are few petitions for review filed by aliens within the Ninth Circuit challenging the *Roldan* decision, since the BIA does not enforce its decision there. Thus, as a practical matter, it is unlikely that the Ninth Circuit sitting *en banc* will have occasion to revisit whether *Lujan-Armendariz* was correctly decided. Rather, in all likelihood (and barring an Act of Congress), it will remain for this Court to resolve the circuit split.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 18, 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 09-4111-ag

Filed: October 20, 2010

MAXINE ELIZABETH WELLINGTON,
Petitioner,

- v.-

ERIC H. HOLDER, JR.,
Attorney General of the United States,
Respondent.

On Petition for Review of a Final Order
of the Board of Immigration Appeals

Before WALKER, CABRANES, Circuit Judges, and SCHEINDLIN, District Judge.*

PER CURIAM:

Maxine Elizabeth Wellington ("petitioner" or "Wellington") petitions for review of a final order of removal entered by the Board of Immigration Appeals ("BIA") on September 14, 2009. Wellington argues that the BIA erred in finding her "convicted" of an offense under 8 U.S.C. § 1182(a)(2)(A)(i)(II)[1]

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* The Honorable Shira A. Scheindlin of the United States District Court for the Southern District of New York, sitting by designation.

[1] Section 1182(a)(2)(A)(i) provides, in pertinent part:

> [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of
>
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),
>
> is inadmissible.

8 U.S.C. § 1182(a)(2)(A)(i).

and ineligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1).[2] She claims that she has not been "convicted" within the meaning of § 1182(a)(2)(A)(i)(II) because she received a

---

[2] Section 1229b(b)(1) provides:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application,
>
> (B) has been a person of good moral character during such period,
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to para-graph (5), and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence

8 U.S.C. § 1229b(b)(1) (emphasis added)

Certificate of Relief from Disabilities ("Certificate of Relief") from the New York court with jurisdiction over her 1995 conviction for drug possession, and because she would have qualified for relief under the Federal First Offender Act had she been prosecuted in federal court. Wellington also argues that the BIA erred in declining to address the question of whether she had accrued 10 years of continuous physical presence for purposes of cancellation of removal under § 1229b(b)(1).

We hold that Wellington was "convicted" of an offense under § 1182(a)(2)(A)(i)(II). Accordingly, we affirm the BIA's decision dismissing her appeal from a denial of an application for cancellation of removal. Because Wellington is ineligible for cancellation of removal on the basis of her criminal offense, we, like the BIA, need not reach the question of whether she has accrued 10 years of continuous physical presence sufficient to satisfy § 1229b(b)(1)(A).

BACKGROUND

Wellington is a citizen of Jamaica who entered the United States without inspection on or about January 23, 1981. On June 21, 1986, she married Steven Wellington, a United States citizen, and on October 29, 1989, she was granted temporary resident status under 8 U.S.C. § 1255a. On May 23, 1995, Wellington was convicted in New York state court of criminal possession of a controlled substance

in the seventh degree (cocaine), under N.Y. Penal Law § 220.03, and sentenced to 120 days in jail. On May 13, 1996, the Immigration and Naturalization Service ("INS") sent her an order terminating her temporary resident status because of her drug conviction. *See* 8 U.S.C. § 1255a(b)(2)(B) (providing that the Attorney General shall terminate temporary resident status if an alien commits an act that renders her inadmissible to the United States as an immigrant).

On February 15, 2007, Wellington was arrested and charged with removability under 8 U.S.C. § 1182(a)(6)(A)(i)[3] as an alien who was unlawfully present in the United States without being admitted or paroled. Wellington was also charged with removability under 8 U.S.C. § 1182(a)(2)(A)(i)(II) as an alien convicted of a controlled substance offense (predicated on her 1995 cocaine conviction). *See* note 1, *ante*.

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[3] Section 1182(a)(6)(A)(i) provides

> An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible

8 U.S.C. § 1182(a)(6)(A)(i).

On March 11, 2008, Wellington appeared before an immigration judge ("IJ") and conceded that she was removable based on her unlawful presence. She disputed, however, that she was removable based on her criminal conviction, or that her conviction would bar her from cancellation of removal under 8 U.S.C. § 1229b(b)(1). Wellington explained to the IJ that she intended to file a motion in state court to vacate her conviction. The IJ continued the case, and Wellington subsequently filed her application for cancellation of removal based on "exceptional and extremely unusual hardship" to her citizen spouse. *Id.*

On March 31, 2008, while her removal proceedings were pending, Wellington filed a motion to vacate her controlled substance conviction in New York state court because she had not received effective assistance of counsel during the prior criminal proceedings. In the alternative, Wellington requested vacatur in light of the likely immigration consequences of her conviction and the evidence of her rehabilitation since the offense. On June 27, 2008, the New York state court denied Wellington's motion to vacate the conviction, finding that the record did not demonstrate ineffective assistance of counsel under federal or state constitutional standards. However, the court issued a Certificate of Relief from Disabilities arising out of the conviction, which it believed was warranted for rehabilitative and immigration purposes.

On December 3, 2008, Wellington appeared before the IJ for a final hearing. She argued that she was statutorily eligible for cancellation of removal. She asserted that the Certificate of Relief in state court barred her prior conviction from being used as a basis for removal or as a means of precluding her from cancellation of removal. In support of her argument, Wellington relied, inter alia, on our decision in *Rehman v. INS*, 544 F.2d 71 (2d Cir. 1976), which held that an alien who received a Certificate of Relief for a state conviction of drug possession was not "convicted" for immigration purposes if full expungement of a federal conviction would have been available for an analogous prosecution in federal court. Wellington also argued that she had satisfied the continuous physical presence requirement for cancellation of removal. *See* § 1229b(b)(1)(A), note 2, *ante*.

At the December 3, 2008 hearing, the IJ held that *Rehman* was not controlling law. He noted that, since *Rehman* was decided, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") had been passed and the INA had been amended to include a statutory definition of "conviction." IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 (1996) (codified at 8 U.S.C. § 1101(a)(48)(A)). Pursuant to this new definition of "conviction," the BIA had held in *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999), that no effect was to be given to a state rehabilitative action such as an

expungement or Certificate of Relief, unless the state court action was related to a substantive or procedural defect in the underlying criminal proceeding. *Matter of Roldan*, 22 I. & N. Dec. at 523. Accordingly, the IJ determined that Wellington's controlled substance conviction subjected her to removal under 8 U.S.C. § 1182(a)(2)(A)(i)(II) and rendered her ineligible for cancellation of removal.

On September 14, 2009, the BIA affirmed the IJ's finding that Wellington was removable and that she was ineligible for cancellation of removal. The BIA substantially agreed with the IJ's analysis of the legal consequences of Wellington's drug conviction. This petition for review followed.

DISCUSSION

An alien's claim that she has not been "convicted" under 8 U.S.C. § 1182(a)(2)(A)(i)(II) and that she remains eligible for cancellation of removal presents a question of law, which we review *de novo*. *See Passi v. Mukasey*, 535 F.3d 98, 101 (2d Cir. 2008). But "when our jurisdiction depends on the definition of a phrase used in the INA, a statute that the BIA administers, and when the intent of Congress is unclear and the agency's interpretation is reasonable," we defer to the BIA in accordance with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *James v. Mukasey*, 522 F.3d

250, 253-54 (2d Cir. 2008) (quotation marks omitted).

In the circumstances presented here, we review the IJ's decision as supplemented by that of the BIA. *See Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005) ("Where the BIA adopts the decision of the IJ and merely supplements the IJ's decision ... we review the decision of the IJ as supplemented by the BIA.").

A.

Wellington challenges the BIA's holding that she has been convicted of a "violation of ... a State [law] ... relating to a controlled substance," 8 U.S.C. § 1182(a)(2)(A)(i)(II), because she received a Certificate of Relief for her 1995 conviction for drug possession. The term "conviction" is defined by 8 U.S.C. § 1101(a)(48)(A), which provides:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty, and

> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

INA § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48)(A). This statutory definition was enacted in 1996 as part of IIRIRA. In *Saleh v. Gonzales*, 495 F.3d 17 (2d Cir. 2007), and *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001), we held that the BIA had reasonably concluded that an alien remains "convicted" of a removable offense under § 1101(a)(48)(A) even when the conviction is vacated or accorded other rehabilitative treatment under state law. *Saleh*, 495 F.3d at 21-25; *Mugalli*, 258 F.3d at 61-62. Wellington now argues that the BIA erred when it failed to recognize an exception to this general rule which purportedly arises as a result of the provisions of the Federal First Offender Act of 1970 ("FFOA"). 18 U.S.C. § 3607.

Under the FFOA, a first-time offender who has been found guilty of an offense under the Controlled Substances Act, 21 U.S.C. § 844, may be ordered, at the discretion of the federal trial court, to serve "probation for a term of not more than one year without [the court's] entering a judgment of conviction." 18 U.S.C. § 3607(a)(2). Upon the offender's successful completion of probation, the court may dismiss the proceedings, and the FFOA provides that such dismissal "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime,

or for any other purpose." 18 U.S.C. § 3607(b) (emphasis added).

Prior to the enactment of IIRIRA, the BIA held in *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995) (*en banc*), that an alien accorded rehabilitative treatment under a state statute would not be removed on the basis of the underlying offense if he could establish that he would have been eligible for treatment under the FFOA had he been prosecuted in federal court. *Id.* at 64. After the statutory definition of "conviction" was enacted by IIRIRA the following year (1996), the BIA retreated from this position. In *Matter of Roldan*, the BIA held that a state conviction followed by rehabilitative action that was not related to a procedural or substantive defect in the underlying criminal proceeding was still "a convict[ion] within the meaning of [§] 101(a)(48)(A)," irrespective of whether the defendant could avail himself of FFOA relief had he been tried in federal court. *Matter of Roldan*, 22 I. & N. Dec. 512, 528 (BIA 1999).

The Courts of Appeals are split as to whether the rule in *Matter of Roldan* should be upheld. Five circuits have agreed with the BIA and held that there is no exception to the definition of "conviction" under the INA for aliens who receive state rehabilitative relief consistent with that available under the FFOA. *See Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157-58 (10th Cir. 2006); *Resendiz-Alcaraz v. Ashcroft*, 383 F.3d 1262, 1266-71 (11th

Cir. 2004); *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 328-31 (5th Cir. 2004); *Acosta v. Ashcroft*, 341 F.3d 218, 222-27 (3d Cir. 2003); *Gill v. Ashcroft*, 335 F.3d 574, 577- 79 (7th Cir. 2003). All five of these courts upheld *Roldan* by applying normal principles of statutory construction, without granting Chevron deference to the BIA's interpretation of the statute.

The Ninth Circuit, however, in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), rejected *Roldan*. Like the other Courts of Appeals, the Ninth Circuit found that the statute was unambiguous and that *Chevron* deference was not warranted. *Id.* at 748–49. The court reached the opposite conclusion about the statute's meaning, however, concluding that an exemption to the definition of "conviction" *existed* for state rehabilitative relief consistent with that available under the FFOA. *Id.* at 749.

In its opinion, the *Lujan-Armendariz* court asserted that the BIA had interpreted IIRIRA as having partially repealed the FFOA. *Id.* at 738 n. 18. The court then held that IIRIRA clearly did not repeal the FFOA and that, accordingly, the BIA's interpretation of the applicable statutory provisions could not be afforded *Chevron* deference. *Id.* at 749. Finally, the court reasoned as follows: (1) Ninth Circuit precedents prohibiting removal of aliens who receive relief under the FFOA remain viable post-IIRIRA, *see Garberding v. INS*, 30 F.3d 1187, 1190 (9th Cir. 1994); *Paredes-Urrestarazu v. INS*, 36 F.3d

801, 811 (9th Cir. 1994); and (2) consequently, principles of equal protection require that the same privileges be accorded to similarly-situated aliens who receive relief under state rehabilitative statutes. *See Lujan-Armendariz*, 222 F.3d at 738, 743–49. The court emphasized that it could not identify a "rational reason to reach different results based on the mere fortuity that the state, and not the federal government, prosecut[ed] an alien for a particular offense." *Id.* at 738 (quotation marks omitted).

Following *Lujan-Armendariz*, the BIA reaffirmed its commitment to the standard set forth in *Roldan*, holding in *Matter of Salazar*, 23 I. & N. Dec. 223 (BIA 2002), that "except in the Ninth Circuit, a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction under § 101(a)(48)(A) of the [INA]." *Id.* at 235.

B.

In our circuit, Wellington's petition for review presents a question of first impression. For present purposes, we assume, without deciding, that an exception to the definition of "conviction" provided in § 101(a)(48)(A) of the INA exists for aliens whose federal charges are dismissed under the FFOA. *See Acosta v. Ashcroft*, 341 F.3d 218, 224 n. 7 (3d Cir. 2003) (observing that neither the BIA nor the Courts of Appeals [except the Ninth Circuit] have "decided whether proceedings that have been dismissed under

the FFOA should be excepted from the definition of conviction provided in [§] 101(a)(48)(A) of the INA."). We also assume that Wellington would have been eligible for FFOA treatment had she been charged with drug possession in federal court under the Controlled Substances Act. *See* 21 U.S.C. § 844. Nevertheless, we conclude that Wellington's claim that she has not been "convicted" under the INA is without merit.

In *Saleh v. Gonzales*, 495 F.3d 17 (2d Cir. 2007), we held that INA § 101(a)(48)(A) was ambiguous with respect to the treatment of convictions subject to rehabilitative treatment. As we stated in *Saleh*, the language of the statute "permits a spectrum of possible interpretations," from treating a conviction subject to state rehabilitative relief "as if it never occurred," to "no post-conviction relief whatsoever" for an alien whose offense constitutes grounds for removal. *Id.* at 22. Under our circuit law, then, the statute is "silent or ambiguous" with respect to Wellington's claims, and we are thus required under the *Chevron* doctrine to consider only whether the BIA has adopted "a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

We see no basis to contradict the BIA's position in *Matter of Roldan* or its decision dismissing Wellington's appeal. Even if the FFOA in fact precludes application of the INA's definition of "conviction" to offenses dismissed under 18 U.S.C. § 3607, there is no reason to create an additional, implied exception

for state rehabilitative treatment on the basis of an analogy to § 3607. The statutory language certainly does not compel the BIA to enforce an implied exception. Nor does the legislative history, which, if anything, supports the BIA's desired interpretation. *See, e.g.*, H.R. Conf. Rep. No., at 224 (1996) (stating that IIRIRA "deliberately broadens the scope of the definition of ' conviction'" in an effort to address the problem that "aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted' have escaped the immigration consequences normally attendant upon a conviction.") In sum, the BIA's refusal to recognize an implied exception to § 101(a)(48)(A) is "rational and consistent with the statute." *See Saleh*, 495 F.3d at 22 (internal quotation marks omitted).

Wellington relies upon our decision in *Rehman v. INS*, 544 F.2d 71 (2d Cir. 1976), to argue that her 1995 drug offense cannot qualify her for removal or render her ineligible for cancellation of removal. In *Rehman*, we held that an alien who received a Certificate of Relief for a marijuana conviction had not been "convicted" for immigration purposes where full expungement of a federal conviction would have been available if he had been prosecuted in federal court. *Rehman*, 544 F.2d at 75. But *Rehman* was decided long before the enactment of the statutory definition of "conviction" under the INA. At the time of *Rehman*, the federal courts and the BIA, as a matter of federal common law, recognized certain

rehabilitative measures for purposes of alien removal. *See, e.g.*, *Mestre Morera v. INS*, 462 F.2d 1030, 1031-32 (1st Cir. 1972); *Matter of Nagy*, 12 I. & N. Dec. 623 (BIA 1968); *Matter of G-*, 9 I. & N. Dec. 159 (BIA 1960); *Matter of O-T-*, 4 I. & N. Dec. 265 (BIA 1951); *but see Kolios v. INS*, 532 F.2d 786, 788-90 (1st Cir. 1976). As we have explained above, circumstances since then have changed. The BIA is now bound by Congress's definition of "conviction" in 8 U.S.C. § 1101(a)(48)(A). And we, in turn, under our own precedent, *see Saleh*, 495 F.3d at 22, accord *Chevron* deference to the BIA's interpretation of Congress's definition.

Finally, notwithstanding our dictum in *Rehman* that "[t]here is no sound reason why state policies should not be accorded the same respect as federal leniency policies," 544 F.2d at 74, there arguably is a rational basis for distinguishing between aliens whose criminal cases are dismissed under the FFOA and aliens who receive Certificates of Relief or similar state rehabilitative relief. As then-Judge Alito observed in *Acosta v. Ashcroft*:

> Congress could have thought that aliens whose federal charges are dismissed under the FFOA are unlikely to present a substantial threat of commit-ting subsequent serious crimes. By contrast, Congress may have been unfamiliar with the operation of state schemes that resemble the FFOA.

> Congress could have worried that state criminal justice systems, under the pressure created by heavy case loads, might permit dangerous offenders to plead down to simple possession charges and take advantage of those state schemes to escape what is considered a conviction under state law.

341 F.3d at 227. Accordingly, we hold that a Certificate of Relief or similar state rehabilitative treatment does not preclude use of the underlying offense as a basis for removal under 8 U.S.C. § 1182(a)(2)(A)(i)(II) or as a basis for ineligibility for cancellation of removal under 8 U.S.C. § 1229b(b)(1), unless the relief was related to a procedural or substantive defect in the criminal proceedings.

CONCLUSION

We have considered all of Wellington's arguments and find them to be without merit. We hold that the BIA permissibly construed 8 U.S.C. § 1101 in *Matter of Roldan*. Accordingly, we conclude that the agency did not err in finding Wellington "convicted" of an offense within the meaning of § 1182(a)(2)(A)(i)(II) and thus ineligible for cancellation of removal under § 1229b(b)(1). Because we dispose of Wellington's petition for review on these grounds, we need not reach the question of whether Wellington accrued 10

years of continuous physical presence sufficient to satisfy the requirements of § 1229b(b)(1)(A).

The petition for review is therefore **DENIED**. As we have completed our review, the pending motion for a stay of removal in this petition is **DISMISSED**.

DECISION OF THE
BOARD OF IMMIGRATION APPEALS

File: A090 258 393 – Buffalo, NY
Date: Sep. 14, 2009

In re: MAXINE ELIZABETH WELLINGTON

IN REMOVAL PROCEEDINGS

ON APPEAL

ON BEHALF OF RESPONDENT:
Eric W. Schultz, Esquire

ON BEHALF OF DHS:
Denise C Hochul
Assistant Chief Counsel

CHARGE:
Notice:

Sec. 212(a)(6)(A)(i), I&N Act
[8 U.S.C. § 1182(a)(6)(A)(i)] –
Present without being admitted or paroled

Sec. 212(a)(2)(A)(i)(II), I&N Act
[8 U.S.C. § 1182(a)(2)(A)(i)(II)] –
Controlled substance violation

Sec. 212(a)(2)(A)(i)(I), I&N Act

[8 U.S.C. § 1182(a)(2)(A)(i)(I)] –
Crime involving moral turpitude

APPLICATION: Cancellation of removal

The respondent has appealed from the Immigration Judge's decision dated December 3, 2008 denying her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1229b(b), for being convicted of a controlled substances violation under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). The respondent's appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issue of discretion, under a *de novo* standard. *See Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008); 8 C.F.R. § 1003.1(d)(3)(ii). Since the request for relief was filed after May 11, 2005, these proceedings are governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). Hence, the amendments made by the REAL ID Act to section 240(c) of the Act, 8 U.S.C. § 1229a(c), apply to this case.

The respondent was convicted on May 23, 1995, in New York of criminal possession of a controlled substance in the seventh degree in violation of Section 220.03 of the Penal Law of the State of New York. *See* Exh. 2. She was given a certificate of relief from disabilities arising from her conviction on June 27, 2008. *See* Exh. 6. We agree with the Immigration Judge that the certificate of relief does not remove the implications of the respondent's drug conviction under the Act. (I.J. at 5–8).

We agree with the Immigration Judge that the respondent's reliance on *Rehman v. INS*, 544 F.2d 71 (2d Cir. 1976), is misplaced (I.J. at 5–7; Respondent's Brief at 3-4). In *Rehman*, the Second Circuit held that where an alien who was accorded a certificate of relief from disabilities for a conviction under New York law for possession of a controlled substance, and who would have been accorded relief from conviction under the predecessor to the Federal First Offender Act, should not be considered "convicted" for immigration purposes. *See Rehman*, *supra*, at 75. However, as the Immigration Judge points out, *Rehman* was decided before there was a federal statutory definition of "conviction" for immigration purposes. *See* section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). Furthermore, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), we determined that under the federal statutory definition of "conviction," no effect is to be given in immigration proceedings to a state action which purports to

expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.

Inasmuch as the respondent is ineligible for cancellation of removal based on her drug conviction, we agree with the Immigration Judge that we need not address the respondent's argument that she has accrued 10 years of continuous physical presence (I.J. at 8; Respondent's Brief at 4-6).

In conclusion, we agree with the Immigration Judge's decision that the respondent is removable, and that her application for cancellation of removal should be denied under section 240A(b)(1) of the Act.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

[Signed]

For the Board

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Buffalo, New York

December 3, 2008

In the Matter of

MAXINE ELIZABETH WELLINGTON
Respondent

In Removal Proceedings
File Number A 090 258 393

CHARGES:

Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act) – present without permission or parole; Section 212(a)(2)(A)(i)(I) of the Act – convicted of a crime of moral turpitude; Section 212(a)(2)(A)(i)(II) of the Act – conviction of a controlled substance violation.

APPLICATION:

Cancellation of removal pursuant to Section 240A(b) of the Act.

ON BEHALF OF THE RESPONDENT:

Eric W. Schultz, Esquire

1100 MT Center

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ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

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[CORRECTED] ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this cause is a 49-year-old married female, native and citizen of Jamaica, who originally entered the United States on or about January 23, 1981, and was not then admitted or paroled after inspection and authorization by an immigration officer. On October 20, 1989, the respondent was granted temporary residence status pursuant to Section 245A of the Act.

On October 21, 1991, the respondent was convicted in the City Court of Geneva, County of Ontario, State of New York, of the offense of forgery in the third degree in violation of Section 170.05 of the Penal Law of the State of New York (Penal Law). On May 23, 1995, the respondent was again convicted, this time in the City Court of Rochester, County of Monroe, State of New York, of the offense of criminal possession of a controlled substance in the seventh degree in violation of Section 220.03 of the Penal Law. On May 13, 1996, the respondent's temporary residence status was terminated.

By Notice to Appear dated February 15, 2007, the respondent was charged as being subject to removal pursuant to Section 212(a)(6)(A)(i) of the Act, as an alien present without permission or parole, Section 212(a)(2)(A)(i)(I) of the Act, as an alien convicted of a crime involving moral turpitude, and Section

212(a)(2)(A)(i)(II) of the Act, as one convicted of a controlled substance violation.

At a hearing conducted on March 11, 2008, the respondent, through counsel, admitted her alienage, the date and unlawful manner of her original arrival to the United States, the grant and subsequent termination of her temporary residence status, her conviction for the offense of forgery in the third degree; but neither admitted nor denied the alleged conviction for criminal possession of a controlled substance in the seventh degree. The respondent conceded inadmissibility under Section 212(a)(6)(A)(i) of the Act as an alien present without permission or parole, but denied all others and sought as relief from removal cancellation of removal and adjustment of status for certain nonpermanent residents under Section 240A(b)(1) of the Act.

The respondent argues first that her conviction offense for forgery in the third degree qualifies as a petty offense under the Act and thus cannot serve as a basis of inadmissibility under Section 212(a)(2)(A)(i)(I) of the Act. The respondent also contends that the issuance of a Certificate of Relief from Disabilities pursuant to Section 701 of the New York Corrections Law, precludes a finding that her conviction for criminal possession of a controlled substance in the seventh degree renders her subject to removal. Citing *Rehman v. INS*, 544 F.2d 71 (2d Cir. 1976) as support for this position, the respondent asserts that she is not subject to removal

as one convicted of a controlled substance violation and is therefore eligible for cancellation of removal.

As an initial matter, the Court agrees with respondent's first challenge that she is not subject to removal under Section 212(a)(2)(A)(i)(II) of the Act, as an alien convicted of a crime of moral turpitude, in that, the respondent's conviction offense, although a crime of moral turpitude, qualifies as a petty offense under Section 212(a)(2)(A)(ii)(II) of the Act. That section provides as follows, "Clause (i)(I) shall not apply to an alien who committed only one crime if (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts of which the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed)."

Forgery in the third degree under Section 170.05 of the Penal Law is designated as a Class A misdemeanor. Under Section 70.15(1) of the Penal Law a sentence of imprisonment for a Class A misdemeanor shall not exceed one year. The respondent in this case was sentenced to a period of three months. The respondent's offense qualifies, therefore, as a petty offense and a nonqualifying

offense for purposes of Section 212(a)(2)(A)(i)(I) of the Act.

The Court, however, rejects the respondent's second argument that her Certificate of Relief from Disabilities precludes a finding that her conviction for criminal possession of a controlled substance in the seventh degree renders her removable.

The *Rehman* case cited by the respondent involved a native and citizen of Pakistan who was convicted on a New York State charge of criminal possession of a controlled substance in the seventh degree and was granted Certificate of Relief from Disabilities at the time of sentencing. Deportation proceedings were commenced shortly thereafter on the basis of his conviction offense as one convicted of a controlled substance violation. Following his deportation hearing, Rehman was found deportable by virtue of his conviction and ordered deported from the United States. The Board dismissed his appeal.

The Board of Immigration Appeals recognizing that the grant of the certificate did not expunge the conviction, nonetheless vacated the order of deportation and set forth the following principle with respect to section 701 certificates. "Where state judicial relief from disabilities is clearly intended to prevent mandatory deportation and full expungement of a federal conviction would have been available in an analogous case, the offender should be held not to have been convicted." The Court reasoned that since full expungement could at

that time have been available to Rehman if he had been tried on federal charges rather than on a New York State charge, in that he could have been eligible for expungement under the Federal Youth Corrections Act or given probation without a conviction as a first offender convicted of simple possession of marijuana, he should be accorded the same benefit in view of the similar state leniency policy.

At the time *Rehman* was decided, however, there was no federal statutory definition of "conviction" for immigration purposes. Since then, the Immigration and Nationality Act has been amended and now provides a federal definition of "conviction". Section 101(a)(48)(A) provides that "the term conviction means, with respect to an alien, a formal judgment of guilt of the alien entered by a Court or, if adjudication of the guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."

In *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) the Board considered whether an expunged narcotics conviction could form the basis for an order of deportation in light of the new definition of conviction. It held that under the statutory definition of conviction under Section 101(a)(48)(A)

of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.

It further noted that the policy exception in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995) which accorded federal first offender treatment to certain drug offenders who had received state rehabilitative treatment is superseded by the enactment of Section 101(a)(48)(A) of the Act.

The Court finds Matter of Roldan dispositive of the issue raised here. The record reflects that the respondent pled guilty with respect to the offense of criminal possession of a controlled substance in the seventh degree, the substance being cocaine, and the Court entered a formal judgment of guilt and sentenced the respondent.

The issuance of the Certificate of Relief from Disabilities for reasons unrelated to the legal propriety of the underlying judgment of conviction does not eliminate the respondent's conviction for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *see also Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) (noting that, except in the Ninth Circuit, a first-time single drug possession offense expunged under a state rehabilitative statute is a conviction under Section

101(a)(48)(A) of the Act). Moreover, under New York Correction Law a Certificate of Relief from Disabilities is designed to mitigate the consequences of a conviction, it does not eradicate or expunge the underlying conviction. *See Morrisette v. Dilworth*, 59 N.Y.2d 449, 451 n.2, 452 N.E.2d 1222, 1223 n.2, 465 N.Y.S.2d 894, 895 n.2 (1983); *see* New York Correction Law - Section 700 *et seq.*

Accordingly, the Court finds that the respondent in this case has been convicted and that the issuance of a Certificate of Relief from Disabilities does not preclude the use of that conviction for immigration purposes. The Court finds, therefore, that the respondent is subject to removal as one convicted of a controlled substance violation under Section 212(a)(2)(A)(i)(II).

The Court also finds the respondent statutorily ineligible for cancellation of removal regardless of counsel's argument regarding the accrual of a new period of continuous presence following the occurrence of an event terminating the continuous residence or physical presence found in Section 240A(d)(1) of the Act. Section 240A(b)(1)(C) provides plainly and unambiguously that an alien convicted of an offense under Section 212(a)(2) of the Act is statutorily ineligible for relief. *See* H.R. Conf. Report No. 104-828 at 198 ("Joint Explanatory Statement of the Committee of Conference") (stating that the Attorney General may cancel removal in the case of an alien who "*has at no time* been convicted of

an offense that would render the alien inadmissible under Section 212(a)(2)(A)" of the Act) (emphasis added).

The record here reflects, as earlier noted, that the respondent has been convicted of a controlled substance violation, a violation which renders her inadmissible to the United States under Section 212(a)(2) of the Act.

Accordingly, based on the plain language of Section 240A(b)(1)(C) of the Act, the Court finds the respondent statutorily ineligible for cancellation of removal as an alien who has been convicted of an offense under Section 212(a)(2) of the Act.

Accordingly, the Court finds the respondent inadmissible under Sections 212(a)(6)(A)(i) of the Act, as an alien present in the United States without permission or parole, and Section 212(a)(2)(A)(i)(II) of the Act, as an alien convicted of a controlled substance violation. The Court finds the respondent statutorily ineligible for cancellation. And finally, the respondent having made no other applications for relief of removal is hereby ordered removed from the United States to the country of Jamaica in accordance with the found charges.

MICHAELANGELO ROCCO
Immigration Judge

STATE OF NEW YORK
COUNTY OF MONROE
CITY COURT OF ROCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

- v.-

MAXINE WELLINGTON,

Defendant.

APPEARANCES:

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DECISION

MELCHOR E. CASTRO, JUDGE

The defendant, currently the subject of deportation proceedings, moves to vacate a judgment of conviction and withdraw her plea of guilty, upon the grounds that she was denied effective assistance of counsel. Defendant claims that her attorney provided her with erroneous information that a plea of guilty would not cause her deportation and that but for that advice she would not have pleaded guilty (CPL 440.10[1][g]).

A hearing was conducted before the court in which the defendant and her attorney both testified. The court makes the following findings of fact and conclusions of law. On December 1, 1994, the defendant, who was and is a resident alien from the nation of Jamaica, was arrested and charged with Criminal Possession of a Controlled Substance, 2nd Degree (Penal Law § 220.18[1]) and Criminal Possession of a Controlled Substance, 3rd Degree (Penal Law § 220.16[1]) for possession cocaine. Following plea negotiations, the felony counts were reduced to two counts of Criminal Possession of a Controlled Substance, 7th Degree on March 1, 1995 (CPL 180.50). The defendant thereafter pleaded guilty to one count of Criminal Possession of a Controlled Substance, 7th Degree, to satisfy the

other count, and was duly sentenced to a definite one hundred twenty day term of incarceration.

Prior to her plea, the defendant conferred with her attorney. Defense counsel has no present recollection of what transpired during their conferences, nor does he still possess the case file. Defendant alleges that her attorney advised her that if she pled guilty to the misdemeanor, she would not be sent home.

During the plea colloquy, the defendant indicated that she had be given sufficient time to consult with her attorney and was satisfied with the manner in which her case was handled by her attorney and with the advice provided. The defendant thereafter admitted to possessing a small quantity of cocaine (Exhibit 1).

Upon the commencement of her term of incarceration, defendant was visited by two Immigration and Naturalization Service (INS) agents, who indicated that they would be in touch. It was not, however, until 2007, when defendant was arrested by immigration officers that deportation proceedings were initiated.

CPL 440.10(1)(h) provides that at any time after the entry of judgment, a court, upon motion of a defendant, vacate the judgment where it was obtained in violation of a right accorded the defendant under the state or federal constitution. Deportation has been deemed to be a collateral

consequence of a criminal conviction. Generally, an attorney's failure to advise a client about the collateral consequences of a conviction does not constitute ineffective assistance of counsel (*People v Ford*, 86 NY2d 397 [1995]). However, "under certain circumstances, a defense counsel's incorrect advise as to the deportation consequences of a plea may constitute ineffective assistance of counsel." (*People v. McDonald*, 1 NY3d 109 [2003]).

Since the defendant did not specify whether she was making her claim under the State or Federal Constitution, the court will consider her rights under both.

"The Federal standard for claims of ineffective assistance based upon a counsel's performance was set forth by the Supreme Court in *Strickland v Washington* (46 US 668). The two-party Strickland test requires a showing that 'counsel's performance was deficient and that the deficiency in performance prejudiced defendant' (*People v Ford*, 86 NY2d 397, 405, supra). As to the 'prejudice' aspect, 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome' (466 US, at 694." (*People v. Benevento*, 91 NY2d 708, 713 [1998]). In the context of a plea the question as to the second prong is whether "'there is a reasonable probability that, but for counsel's errors, he would not have

pleaded guilty and would have insisted on going to trial.'" (*People v McDonald*, 1 NY3d at 133 [citation omitted]).

Resolution of the issues presented to the court on this motion has been hampered not only by the passage of thirteen and one-half years, which has devastated the witness' recollection of events, and the concomitant dearth of evidence submitted to the court for consideration. The only testimony regarding counsel's advise to his client was from the defendant, who stated no more than that counsel told her that if she pled guilty to a misdemeanor she would not be sent home. Applying the first part of the *Strickland* test to the defendant's undisputed testimony, the court finds that counsel's affirmative misrepresentation of the law on this issue fell below an objective standard of reasonableness. (*People v McDonald*, 1 NY3d at 115).

However, Defendant proof falters on the prejudice prong under *Strickland*, because she failed to "show that there is a reasonable probability that but for counsel's error, [s]he would not have pleaded and would have insisted on going to trial." (*Hill v Lockhart*, 474 US 52, 59 [1985]). Defendant's testimony regarding her discussions with defense counsel about the plea lacked any detail, save for his misstatement about the likelihood of deportation. Although defendant stated that she would not have pleaded guilty but for that advice, her present certitude is belied by the looming specter of her

current deportation problems. Moreover such a claim is valueless unless measured against the other factors involved in the plea decision.

In assessing whether there is a reasonable probability that no guilty plea would have been entered, the court is mindful that conviction on top count contained in the felony complaint required the imposition of an indeterminate sentence of incarceration with a minimum range of from three to eight and one-third years and a maxim term of life imprisonment. Conviction on the Class B felony, which was also charged in the accusatory instrument carried a maximum sentence range of three to to twenty five years, with a minimum set at one-third the maximum, or a sentence of lifetime probation. In contrast the defendant's maximum exposure on a class A misdemeanor was a determinate sentence of year, or the possibility of any one or more of a wide range of sentence alternatives available to the court on a plea to a misdemeanor. Had defendant been provided the correct information regarding deportation on a drug misdemeanor, and the threat of deportation being equal, it seems fairly remote that defendant would have risked a lengthy prison sentence and proceeded to trial rather than accept the highly favorable plea offer garnered by defense counsel on her behalf.

Moreover, the plea discussions were most certainly not limited to the potential sentence. The strength of the case against the defendant and the

likelihood of conviction; whether the defendant had standing to assert a Fourth Amendment violation and the likelihood of success on a suppression motion; whether the defendant made admissions to the police; and what potential defenses might be raised, were among the factors defendant and counsel would have naturally discussed. Without knowing what else was said the plea conferences between defendant and counsel, the court cannot properly evaluate the *Strickland* prejudice prong.

The defense motion on state constitutional ground must also be dismissed. A claim of ineffective assistance of counsel under the New York State Constitution is "resolved by viewing a particular case in its totality to determine if a defendant received meaningful representation, and defendant must demonstrate that he suffered actual prejudice as a result of counsel's deficiencies." (*People v McDonald*, 296 AD2d 13, 17 [2002] [citations omitted]).

"In the context of a guilty plea, a defendant has been afforded meaningful representation, which does not mean 'perfect representation,' 'when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' (citations omitted). *People v Ford*, 86 NY2d at 404. The representation as a whole and the fairness of the process must be measured to determine if it was meaningful for defendant." (*People v Felipe*, 15 M3d 1124(A) [2007]). Given the

state of the record, the court cannot conclude the representation afforded the defendant was anything but meaningful.

Notwithstanding the court's conclusions regarding the legal merits of the instant application, as an interested on-looker of the deportation proceedings, it is the court cannot help but conclude that the interests of justice mandate that the deportation case be decided in the defendant's favor. It is not out of bounds for this court to observe that the inaction of the Immigration and Naturalization Service on defendant's deportation case has contributed to the sparse record presented here. Had the INS acted swiftly in 1995, and the instant motion made then, the entire scope of the conversations held between client and counsel would have been more fresh in memory (*compare, e.g., People v McDonald*, 1 NY3d 109 [2003], *supra*, where the INS served the defendant with notice of deportation the day after the plea and defendant brought this CPL 440 application seven weeks later).

Defendant's attorney readily conceded that he had no specific recollection of their conversations and that the case file was unavailable. Defendant herself, was barely able to articulate the specific advise regarding her deportability provided by counsel. Instead of being able to mount a cogent attack on the plea, aided by memory of current events, the intervening thirteen years, the advise of counsel and the inaction of INS, all lulled the

defendant into a false sense of security and washed her memory of important details.

Moreover, in the intervening thirteen year period between the entry of the plea and the filing of this motion, defendant completed her sentence of incarceration, raised a family, became gainfully employed, and from all appearances, has led a model life. It is the hope of this court that the disposition of the deportation case take all these factors into consideration.

This decision constitutes the order of the court.

DATED: Rochester, New York
June 29, 2008

HON. MELCHOR E. CASTRO

18 U.S.C. § 3607. Special probation and expungement procedures for drug possessors

(a) Pre-judgment probation.--If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)--

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) Record of disposition.--A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under

subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) Expungement of record of disposition.--If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury,

false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

8 U.S.C. § 1101. Definitions

(a) As used in this chapter—

* * *

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(6) Illegal entrants and immigration violators

(A) Aliens present without admission or parole

(i) In general

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

8 U.S.C. § 1229b. Cancellation of removal; adjustment of status

* * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien--

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

No. 10-933

In the Supreme Court of the United States

MAXINE ELIZABETH WELLINGTON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, assuming a federal conviction for simple drug possession that has been expunged in accordance with the Federal First Offender Act (FFOA), 18 U.S.C. 3607, does not qualify as a "conviction" for immigration purposes, an expunged state conviction for simple drug possession must be treated in the same manner.

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In the Supreme Court of the United States

No. 10-933

MAXINE ELIZABETH WELLINGTON, PETITIONER

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ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 623 F.3d 115. The decisions of the Board of Immigration Appeals (Pet. App. 19a-22a) and the immigration judge (Pet. App. 23a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2010. The petition for a writ of certiorari was filed on January 18, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, Congress enacted the Federal First Offender Act (FFOA), 18 U.S.C. 3607. Under that law, if a person is found guilty of a federal offense involving simple possession of a controlled substance in violation

of 21 U.S.C. 844, and that person has no prior drug convictions and has not previously had a case disposed of under the FFOA, the district court may place him or her on probation "for a term of not more than one year without entering a judgment of conviction." 18 U.S.C. 3607(a). If, at the end of the term of probation, the person has not violated any condition of probation, "the court shall, *without entering a judgment of conviction*, dismiss the proceedings against the person and discharge him from probation." *Ibid.* (emphasis added). If a conviction is thus expunged under the FFOA, it "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. 3607(b).

Aliens convicted of certain drug offenses face a number of immigration consequences. For example, an alien convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in [21 U.S.C. 802])" is inadmissible, 8 U.S.C. 1182(a)(2)(A)(i)(II), and an alien convicted of a drug offense is deportable, 8 U.S.C. 1227(a)(2)(B)(i). In *In re Manrique*, 21 I. & N. Dec. 58 (1995), the Board of Immigration Appeals (Board) ruled that "an alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) * * * had he been prosecuted under federal law." *Id.* at 64.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322(a), 110 Stat. 3009-628, Congress amended the Immigration

and Nationality Act (INA), by adding the following definition:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. 1101(a)(48)(A). In *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (1999), vacated *sub nom. Lujan-Armendariz* v. *INS*, 222 F.3d 728 (9th Cir. 2000), the Board concluded that its earlier decision in *In re Manrique* had been "superseded" by the new definition of "conviction" in Section 1101(a)(48)(A). See *id.* at 528. Thus, the Board explained that "[s]tate rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Ibid.*

2. Petitioner is a native and citizen of Jamaica who entered the United States without inspection in 1981. Pet. App. 4a. In 1986, she married a United States citizen, and in 1989, she was granted temporary resident status. *Ibid.* In 1991, petitioner was convicted in New York state court of forgery in the third degree. *Id.* at 25a. In 1995, she was convicted in New York state court of criminal possession of a controlled substance in the

seventh degree (cocaine), under N.Y. Penal Law § 220.03 (McKinney 1989), and sentenced to 120 days in jail. Pet. App. 4a-5a. In 1996, the Immigration and Naturalization Service (INS) terminated her status as a temporary resident because of her drug conviction. *Id.* at 5a.

3. In 2007, the Department of Homeland Security charged petitioner with being removable on three grounds: as an alien who was present in the United States without having been admitted or paroled (see 8 U.S.C. 1182(a)(6)(A)(i)); as an alien convicted of a crime involving moral turpitude (*i.e.*, the 1991 forgery conviction) (see 8 U.S.C. 1182(a)(2)(A)(i)(I)); and as an alien convicted of a controlled-substance offense (*i.e.*, the 1995 cocaine conviction) (see 8 U.S.C. 1182(a)(2)(A)(i)(II)). Pet. App. 25a-26a.

Before an immigration judge (IJ), petitioner conceded that she was removable based on her unlawful presence, but contested that she was removable based on her criminal convictions, and she argued that, despite her controlled-substance conviction, she was eligible for discretionary cancellation of removal under 8 U.S.C. 1229b(b)(1). Pet. App. 6a, 26a.

While her removal proceedings were pending, petitioner filed a motion in state court to vacate her controlled-substance conviction, or, in the alternative, for a "Certificate of Relief from Disabilities" arising out of that conviction. Pet. App. 6a. In June 2008, the state court denied petitioner's motion to vacate the conviction, but issued a Certificate of Relief from Disabilities, which it believed was warranted for rehabilitative and immigration purposes. *Id.* at 6a, 33a-41a.

In December 2008, the IJ found petitioner removable and rejected her arguments that the state-court certifi-

cate of relief barred the use of her prior drug-possession conviction as a basis for removal or as a basis to make her ineligible for cancellation of removal. Pet. App. 28a-32a.

In September 2009, the Board dismissed petitioner's appeal, agreeing with the IJ that the 1996 definition of "conviction" in 8 U.S.C. 1101(a)(48)(A) prevented the state certificate of relief from removing the immigration consequences of her drug conviction. Pet. App. 19a-22a. The Board specifically agreed with the IJ that the matter was not controlled by the Second Circuit's decision in *Rehman* v. *INS*, 544 F.2d 71 (1976), which held that an alien who received a certificate of relief for a state conviction of drug possession was not "convicted" for immigration purposes if full expungement of a federal conviction would have been available for an analogous prosecution in federal court. Pet. App. 21a. The Board explained that Congress had enacted the new definition of "conviction" after *Rehman* was decided, and the Board had since held that, in light of that definition, no effect was to be given to a state rehabilitative action such as an expungement or certificate of relief, unless the state-court action was predicated on a substantive or procedural defect in the underlying criminal proceeding. *Id.* at 21a-22a; see *In re Roldan-Santoyo*, 22 I. & N. Dec. at 523.

4. Petitioner filed a petition for review in the court of appeals, which denied the petition. Pet. App. 1a-18a. The court rejected petitioner's claim that she had not been "convicted" for immigration purposes. *Id.* at 14a. The court noted that whether the Board's construction of the statute should be upheld was a matter of first impression in the Second Circuit. *Id.* at 13a. It also recognized that the Ninth Circuit had disagreed with five

other circuits on that question. *Id.* at 11a-12a (contrasting the Ninth Circuit's decision in *Lujan-Armendariz* v. *INS*, 222 F.3d 728 (2000), with the decisions in *Ballesteros* v. *Ashcroft*, 452 F.3d 1153, 1157-1158 (2006), adhered to in pertinent part on reh'g, 482 F.3d 1205 (10th Cir. 2007); *Resendiz-Alcaraz* v. *United States Att'y Gen.*, 383 F.3d 1262, 1266-1271 (11th Cir. 2004); *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 328-331 (5th Cir. 2004); *Acosta* v. *Ashcroft*, 341 F.3d 218, 222-227 (3d Cir. 2003); *Gill* v. *Ashcroft*, 335 F.3d 574, 577-579 (7th Cir. 2003)). In order to decide whether a State's rehabilitative action could implicate an implicit exception from the definition of "conviction" in Section 1101(a)(48)(A), the court of appeals assumed without deciding that such an exception exists for aliens who have had *federal* charges dismissed under the FFOA and also that petitioner "would have been eligible for FFOA treatment had she been charged with drug possession in federal court" as opposed to state court. Pet. App. 13a-14a.

The court of appeals then applied the framework under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), for reviewing an agency's interpretation of a statute that it administers. The court concluded that Section 1101(a)(48)(A) is ambiguous with respect to the treatment of convictions subject to rehabilitative treatment, in light of its earlier decision in *Saleh* v. *Gonzales*, 495 F.3d 17 (2d Cir. 2007), which held that "the language of the statute 'permits a spectrum of possible interpretations,' from treating a conviction subject to state rehabilitative relief 'as if it never occurred,' to 'no post-conviction relief whatsoever' for an alien whose offense constitutes grounds for removal." Pet. App. 14a (quoting *Saleh*, 495 F.3d at 22). The court of appeals held that neither the statutory language nor the legislative

history compels the Board to enforce an implied exception for state rehabilitative actions by analogy to the FFOA. *Id.* at 15a. It thus concluded that the Board's refusal to recognize an implied exception to the definition of "conviction" for state rehabilitative actions is rational and consistent with Section 1101(a)(48)(A). *Ibid.* The court rejected petitioner's claim that the Second Circuit's 1976 decision in *Rehman* was controlling after the enactment of the new definition of "conviction," particularly given the deference owed to the agency's interpretation of the new statutory provision. *Id.* at 15a-16a.

Finally, the court of appeals also rejected petitioner's argument that it should follow dictum in *Rehman* to the effect that there is "no sound reason why state policies should not be accorded the same respect as federal leniency policies." Pet. App. 16a (quoting *Rehman*, 544 F.2d at 74). The court explained that Congress could have had a rational basis for distinguishing between aliens whose criminal cases are dismissed under the FFOA and aliens who receive rehabilitative relief under state law. *Id.* at 16a-17a.

ARGUMENT

Petitioner contends (Pet. 13-17) that the court of appeals erred by deferring to the Board's interpretation of the INA, under which her state-court certificate of relief did not eliminate the immigration consequences of her state conviction. The court of appeals' decision and the underlying Board interpretation of the definition of "conviction" in 8 U.S.C. 1101(a)(48)(A) are correct. Moreover, although the Ninth Circuit has disagreed with every other circuit that has addressed the correctness of the Board's refusal to recognize an implicit ex-

ception to the INA's definition of "conviction" for state-law expungements, petitioner's certificate of relief did not, even for state-law purposes, eliminate several consequences of her conviction, making it possible that the result in her case would have been the same even in the Ninth Circuit. In any event, even if this case were an appropriate vehicle for resolving the conflict in the circuits, review by this Court would be premature at this point, because the outlier circuit—the Ninth Circuit—has granted rehearing en banc in a case involving the question. See *Nunez-Reyes* v. *Holder*, 602 F.3d 1102 (2010), reh'g en banc granted, 631 F.3d 1295 (Sept. 24, 2010) (argued Dec. 14, 2010).

1. Petitioner contends (Pet. 15-17) that canons of statutory interpretation—specifically the canon against implied repeals and the canon of constitutional avoidance—should have prevented the court of appeals from upholding the Board's determination that Section 1101(a)(48)(A)'s definition of "conviction" contains no implicit exception for state-law expungements. Petitioner's arguments lack merit.

a. With respect to the statute itself, petitioner contends that Section 1101(a)(48)(A) should not be construed as effecting a "repeal by implication" (Pet. 15) of the FFOA, which makes it possible for someone with a first-time drug offense for simple possession of a controlled substance under 21 U.S.C. 844 to be placed on probation without the entry of "a judgment of conviction," 18 U.S.C. 3607(a).

The plain language of the INA's definition of "conviction" covers proceedings like the one in New York state court involving petitioner's cocaine-possession offense. As relevant here, that definition applies when "the alien has entered a plea of guilty * * * and * * * the judge

has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. 1101(a)(48)(A)(i) and (ii). Petitioner pleaded guilty to possession of cocaine and was sentenced to 120 days in jail. Pet. App. 34a-35a. Her state-court proceeding thus satisfies the terms of the definition. That definition contains no express exception for convictions that have been expunged, and the courts should not infer that such an exception exists. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 111 (1983). Moreover, the legislative history strongly indicates that Congress adopted the definition of "conviction" with the intention of limiting the effects of state-law ameliorative practices. See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 224 (1996) (explaining that the provision "deliberately broadens the scope of the definition of 'conviction'" because the States have "a myriad of provisions for ameliorating the effects of a conviction"; noting that the definition "clarifies Congressional intent that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws"). The Board has thus reasonably determined that there are no exceptions for state-law dispositions that might not be considered a "conviction" for state-law policy reasons. See *In re Salazar-Regino*, 23 I. & N. Dec. 223, 227 (2002); *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 523 (1999), vacated *sub nom. Lujan-Armendariz* v. *INS*, 222 F.3d 728 (9th Cir. 2000).

That result is not altered by the existence of the FFOA, which deals only with individuals who have been prosecuted for drug possession under federal law (see 18 U.S.C. 3607(a)) and thus has no application to aliens who have *state*-court convictions for drug possession. Even in the context of *federal*-court first-time simple-

possession offenses disposed of in accordance with the FFOA, the application of the INA's definition of "conviction" would not have the effect of an implicit *repeal* of the FFOA, because, "even if a disposition under [Section] 3607 counts as a conviction in immigration law, it would not be a conviction for other purposes, such as firearms disabilities." *Gill* v. *Ashcroft*, 335 F.3d 574, 578 (7th Cir. 2003).[1]

Thus, as Judge Graber recently observed, "[i]t is easy to understand why" the Board and nearly every federal court of appeals except the Ninth Circuit "have disagreed with" the view that petitioner advances here. *Nunez-Reyes*, 602 F.3d at 1107 (Graber, J., concurring).

b. Petitioner also contends (Pet. 15-16) that the court of appeals failed to consider the equal-protection implications of treating aliens convicted under federal law differently from aliens convicted of similar offenses under state law, where both could qualify for FFOA treatment if they had been convicted under federal law. But the court of appeals correctly considered those concerns by finding that "there arguably is a rational basis for distinguishing between aliens whose criminal cases

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[1] The Board has not determined whether a disposition of a federal prosecution under Section 3607 would constitute a "conviction" under Section 1101(a)(48)(A). See *In re Salazar-Regino*, 23 I. & N. Dec. at 231 n.4; see also *Ramos* v. *Gonzales*, 414 F.3d 800, 806 (7th Cir. 2005) ("Ramos's premise—that someone with a FFOA conviction would escape immigration consequences—is not necessarily correct. We do not know what the [Board] would do if it were confronted with this situation, nor do we know whether its decision would pass legal muster."), cert. denied, 546 U.S. 1170 (2006); *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 331 n.12 (5th Cir. 2004) ("We have substantial doubt whether the FFOA controls over the subsequently enacted § 1101(a)(48)(A) [for purposes of a federal prosecution for drug possession under 21 U.S.C. 844].").

are dismissed under the FFOA and aliens who receive Certificates of Relief or similar state rehabilitative relief." Pet. App. 16a.[2]

Even assuming that the FFOA would govern federal convictions, there would be rational bases for treating state convictions differently, and thus no equal protection violation. As the Third Circuit observed in *Acosta* v. *Ashcroft*, 341 F.3d 218 (2003) (Alito, J.), Congress is "[f]amiliar with the operation of the federal criminal justice system." *Id.* at 227. "Congress could have thought that aliens whose federal charges are dismissed under the FFOA are unlikely to present a substantial threat of committing subsequent serious crimes," but it may have been "unfamiliar with the operation of state schemes that resemble the FFOA," and therefore "could have worried that state criminal justice systems, under the pressure created by heavy case loads, might permit dangerous offenders to plead down to simple possession charges and take advantage of those state schemes to escape what is considered a conviction under state law." *Ibid.* Moreover, as Judge Graber has explained, Congress could also have rationally based its distinction on the fact that, because some States do not provide for expungement, an interest in uniformity would counsel against "recogniz[ing] *any* state expungements, rather than adopt[ing] a piecemeal approach" that would make persons "ineligible for relief under the immigration

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[2] The court of appeals also "assume[d], without deciding, that an exception to the definition of 'conviction' provided in [Section 1101(a)(48)(A)] exists for aliens whose federal charges are dismissed under the FFOA." Pet. App. 13a. If the Board were to reach a contrary result on the provision's applicability to federal drug-possession convictions (see note 1, *supra*), there could be no equal-protection concern in the Board's refusal to except state-law convictions.

laws" on the basis of where they were convicted. *Nunez-Reyes*, 602 F.3d at 1107 (Graber, J., concurring).

Particularly given Congress's broad "power in immigration matters," there is "plain[ly]" a rational basis for a distinction between federal and state convictions. *Acosta*, 341 F.3d at 227; accord *Resendiz-Alcaraz* v. *United States Att'y Gen.*, 383 F.3d 1262, 1272 (11th Cir. 2004); *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 332 (5th Cir. 2004). As a result, petitioner's equal protection argument lacks merit.

2. As petitioner notes (Pet. 10-11), and as the court of appeals acknowledged (Pet. App. 11a-12a), there is currently a lopsided conflict in the circuits about the correctness of the Board's decision in *In re Roldan-Santoyo*, *supra*, in which the Ninth Circuit stands alone in concluding that a state-law expungement may prevent a conviction for certain drug offenses from being considered a "conviction" for immigration purposes under Section 1101(a)(48)(A).[3] This Court has previously denied review in cases involving that question. See *Altamirano Hernandez* v. *Gonzales*, 549 U.S. 1111 (2007) (No. 06-318); *Ramos* v. *Gonzales*, 546 U.S. 1170 (2006) (No. 05-467).

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[3] Eight Circuits (the First, Second, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh) have explicitly disagreed with the Ninth Circuit, or have otherwise accepted the Board's interpretation of 8 U.S.C. 1101(a)(48)(A). Compare *Herrera-Inirio* v. *INS*, 208 F.3d 299, 304-306 (1st Cir. 2000); Pet. App. 13a-17a (2d Cir.); *Acosta*, 341 F.3d at 222-227 (3d Cir.); *Madriz-Alvarado*, 383 F.3d at 328-231 (5th Cir.); *Gill*, 335 F.3d at 577-579 (7th Cir.); *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 697 (8th Cir. 2002); *Ballesteros* v. *Ashcroft*, 452 F.3d 1153, 1157-1158 (2006), adhered to in pertinent part on reh'g, 482 F.3d 1205 (10th Cir. 2007); and *Resendiz-Alcaraz*, 383 F.3d at 1266-1271 (11th Cir.), with *Lujan-Armendariz* v. *INS*, 222 F.3d 728, 749 (9th Cir. 2000).

Petitioner contends (Pet. 17-18) that this case "presents a suitable vehicle for resolving the conflict," because "[i]t should be beyond dispute that [she] would have been eligible for cancellation of removal under the Ninth Circuit's decision in *Lujan-Armendariz*." In fact, it is not clear that petitioner would be eligible for relief in the Ninth Circuit. That court has recognized that "exceptions contained in [a State's] expungement statute" may prevent an alien from being eligible for relief under *Lujan-Armendariz*. *Ramirez-Altamirano* v. *Holder*, 563 F.3d 800, 812 (9th Cir. 2009) (finding "the minimal, residual consequences of [the alien's] conviction under [California] law" in that case did not prevent the alien from qualifying for relief under *Lujan-Armendariz*, if the Board were to determine that his jail sentence did not preclude him from qualifying for expungement under the FFOA, but not ruling out that state-law exceptions to the scope of rehabilitation could be "relevant").

Although petitioner repeatedly refers to her New York Certificate of Relief as an "expungement" of her conviction, it provided a narrower form of rehabilitation. Petitioner moved the state court to vacate her conviction, or in the alternative, for a Certificate of Relief from Disabilities under N.Y. Correct. Law § 701 (McKinney Supp. 2008). See Pet. App. 6a, 26a. The state court denied the motion to vacate, but granted the request for a Certificate of Relief. *Id.* at 6a, 33a-41a. Nothing in the New York statute indicates that its application operates to expunge, vacate, dismiss, or otherwise eliminate a conviction; instead, it merely provides that a conviction will not be deemed "a conviction within the meaning of any provision of law that imposes, by reason of a conviction, a bar to any employment, a disability to exercise

any right, or a disability to apply for or to receive any license, permit, or other authority or privilege covered by the certificate." N.Y. Correct. Law § 701(2) (McKinney Supp. 2008). As the Second Circuit has previously recognized, "[u]nder New York law, even though a Certificate of Relief is designed to mitigate the consequences of that conviction, it 'does not eradicate or expunge the underlying conviction.'" *Mugalli* v. *Ashcroft*, 258 F.3d 52, 62 (2001) (quoting *Morrisette* v. *Dilworth*, 452 N.E.2d 1222, 1223 n.2 (N.Y. 1983)).[4]

Thus, the rehabilitation that petitioner received under New York law was not as complete as that in *Ramirez-Altamirano*, where California law had released the alien from "all penalties and disabilities," with certain minor exceptions. 563 F.3d at 812 (citation omitted). Petitioner's relief was also far less complete than the relief that someone guilty of a federal drug-possession offense could have received under the FFOA. See 18 U.S.C. 3607(b).[5] As a result, it is by no means clear that she would be entitled to relief in the Ninth Circuit, which would make this case a poor vehicle for resolving the current conflict in the courts of appeals.

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[4] The New York statute specifically provides that a certificate of relief does not provide relief affecting the "right of such person to retain or to be eligible for public office" (N.Y. Correct. Law § 701(1) (McKinney Supp. 2008)), or licensing actions (*id.* § 701(3)), and the New York Attorney General has opined that a certificate of relief does not affect whether a conviction may be considered when evaluating qualifications as a juror, *Opinion No. F 91-10*, 1991 Op. N.Y. State Att'y Gen. 38, 1991 WL 499877 (Dec. 31, 1991).

[5] Even if the limitations on the scope of petitioner's rehabilitation under New York law would not prevent her from receiving relief in the Ninth Circuit, they further vitiate her equal protection argument, because she "simply did not obtain relief analogous to that provided by the FFOA." *Ramirez-Altamirano*, 563 F.3d at 818 (Ikuta, J., dissenting).

3. In any event, even if this were an appropriate vehicle for resolving the current conflict, review of the question now would be especially premature, because the Ninth Circuit granted the government's petition for rehearing en banc in a case involving the question on September 24, 2010. See *Nunez-Reyes* v. *Holder*, 631 F.3d 1295. The en banc court heard oral argument in that case on December 14, 2010, and its decision could eliminate the conflict. See *Nunez-Reyes*, 602 F.3d at 1107 (Graber, J., concurring) ("[W]ere we to reconsider our rule en banc, I would join our sister circuits' unanimous recognition that Congress reasonably distinguished between aliens subject to a state expungement and aliens subject to a federal expungement."); *id.* at 1105 (Graber, J., concurring) (citing opinions by Judges Ikuta and Fernandez suggesting that the Ninth Circuit's current approach is incorrect or should be revisited).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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